BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RITA F. WHISENAND	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,056,966
STANDARD MOTOR PRODUCTS, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY INSURANCE CORP.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the January 31, 2012 preliminary hearing decision entered by Administrative Law Judge Marcia L. Yates (ALJ).

ISSUES

This matter originally came before the Board on an appeal from a November 14, 2011, preliminary decision. The ALJ determined that claimant had failed to provide timely notice of her injury, denying benefits at that time. A Board Member determined that the ALJ failed to determine the date of accident under K.S.A. 44-508(d). When that determination was reached, the date of accident was established as July 14, 2011, under the pre-May 15, 2011 version of K.S.A. 44-508(d). Notice was found to be timely. The matter was then remanded to the ALJ.

A second preliminary decision, the subject of this appeal, was then issued by the ALJ on January 31, 2012, awarding claimant medical treatment with Dr. Galate as the authorized treating physician. The ALJ determined that should Dr. Galate feel claimant is incapable of engaging in any type of substantial and gainful employment, claimant would be entitled to temporary total disability benefits as of the date of that determination and would be paid until claimant reaches maximum medical improvement, is returned to substantial and gainful employment, or until further order of the court.

The respondent requests review of whether the claimant sustained her burden of proof that she suffered personal injury by accident arising out of and in the course of her employment.

Claimant argues that ALJ's decision should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing decision should be affirmed.

Claimant has worked for respondent for 21 years. The position she held over the last two years was in shipping and receiving. Her last day of work was April 21, 2011. Claimant testified that in early 2011 changes were made to her work duties and the job became more physically demanding. She was constantly reaching, pulling, bending, twisting and lifting to unload or break down skids (pallets). Claimant testified that there can be as many as 50 boxes on a skid. The boxes weighed anywhere from 50 to 80 pounds. She also drove a forklift. Claimant performed this work 40 hours a week with no overtime. She testified that the longer she operated the forklift the more she noticed increased pain in her left shoulder and low back. To get in and out of the forklift, claimant had to raise her left arm up to a handle and pull herself up while stepping up with her right leg. She would do this 25-30 times a day.[1]

Claimant testified that the back pain she experienced radiated down into her right leg. She stated that over the years she has gotten used to certain levels of aches and pains, but the pain in 2011 was more extreme, leaving her barely able to walk to her car. She tried to protect her low back by placing bubble wrap around the seat of the forklift.

Claimant reported left shoulder pain to her primary care physician, Dr. Susan Laningham on January 31, 2011 and again on June 24, 2011. Claimant testified that she discussed her low back pain issues with Dr. Laningham. Claimant was initially examined for her low back complaints by Dr. Laningham on April 6, 2011. She was referred for an MRI on April 19, 2011, which displayed multiple level disc bulging from T11 to L-5, and degenerative changes. She did not want to file a workers compensation claim with respondent because of employee incentives. The report from the April 6, 2011 evaluation discusses the demanding nature of claimant's job and notes that by the end of her work day, she could barely walk. It also noted the worsening of claimant's pain over the last few weeks.[2] Claimant did not return to Dr. Laningham, with low back pain and right lower

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[1] P.H. Trans. at 13-14.

[2] *Id.* at 17; Cl. Ex. 1 at 3.

extremity radiculopathy until April 19, 2011. It was at this time that claimant was referred for the MRI discussed above.

Claimant testified that when she reported her complaints to her supervisor, Ron Williams, at the regular staff meeting, Mr. Williams responded that it was "hell to get old" and continued on with his business. Claimant testified that her intent with that conversation was to let Mr. Williams know that the job was too hard for her and that she was having pain.[3] Mr. Williams testified that conversation never occurred.

Claimant acknowledged that she understood she was obligated to report to her supervisor that she had a workers compensation accident. But she didn't report a work accident until July 2011 after she was no longer working.

Claimant testified that when Mr. Williams and another supervisor, Brian Bierman asked her what the bubble wrap around her forklift seat was for, she told them it was for her low back. Those conversations took place before claimant was laid off on April 21, 2011.[4] Claimant testified that the company lay off was based on seniority and she chose to take it so that she could give her back time to get better. But her back and shoulder did not get better. Both Mr. Williams and Mr. Bierman deny that the conversation about the bubble wrap ever occurred.

On a referral by Dr. Laningham, claimant sought additional medical treatment with Sean R. Clinefelter, M.D., on May 16, 2011. Claimant indicated on forms provided to Dr. Clinefelter that changes in her job caused her pain throughout her whole body to the point that, at times, she couldn't walk by the end of the day. When answering the question on the patient intake form as to what made her condition worse, claimant answered walking, lifting, treadmill, yard work and vacuuming. The form also asks if the pain was the result of a work-related accident. Claimant answered "don't think so".[5] Claimant told the doctor that her problem had been in existence for at least one year, but had become steadily worse over the last few weeks to months.[6] Claimant received three epidural injections in her low back from Dr. Clinefelter. An MRI on July 6, 2011, identified a full tear of claimant's rotator cuff in her left shoulder.

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[3] *Id.* at 20.

[4] *Id.* at 22.

[5] *Id.*, Resp. Ex. A.

[6] *Id.*, Resp. Ex. I.

On July 11, 2011, after claimant told her supervisor that the pain she was having was from her job, she was sent to an authorized physician by respondent .[7]

The authorized physicians at OHS recorded a date of injury of July 1, 2011. However, the July 14, 2011 report also notes claimant's back pain was present before her layoff in April 2011. The OHS doctors provided claimant with treatment recommendations and work restrictions as noted in the July 14, 2011 report. However, claimant has yet to receive any treatment. Claimant was given specific temporary restrictions by the OHS authorized treating physicians, of no lifting over 5 pounds, no work above shoulder height, no driving, no squatting or stooping and table or bench height only. Claimant has not been returned to work despite the fact that her layoff ended on August 1, 2011.

Claimant was referred to William H. Tiemann, M.D., for an examination on July 14, 2011. Claimant was diagnosed with left rotator cuff tear, cervical neck strain and lumbosacral strain with sciatica on the right side. The report indicates that claimant denied any previous back injuries. However, claimant was treated for low back problems as early as February 22, 1995, when she alleged a work-related low back injury. She received epidural injections in 1998 due to ongoing low back pain and radiculopathy into her left leg. The court noted that claimant had filed nine prior work-related injuries. In 1993, claimant suffered a work-related injury to her left knee, resulting in an altered gait and a low back strain. Claimant acknowledged that, in the past, when claiming a work injury, she was generally referred for medical treatment.

Claimant had also filed a prior workers compensation claim on her left shoulder in 2004, alleging injuries from repetitive lifting, pulling, pushing and making boxes.

Claimant filed a claim in June, 2009, alleging injuries to her neck, lower back, head, right shoulder and arm. She was referred for medical treatment with Wayne W. Williamson, D.O., and diagnosed with a lumbosacral strain, cervical strain and a left shoulder/scapula contusion as the result of a fall. By the June 23, 2009 examination, the low back pain had resolved, with ongoing pain in the neck and upper back. However, on July 6, 2009, the low back pain returned due to "packing". That increased pain in the low back only lasted one week, as by July 13, 2009, the low back pain had again resolved. On July 21, 2009, claimant was improved. Claimant was returned to work at regular duty on July 28, 2009 without restrictions.[8]

Claimant was examined and treated by Dr. Laningham on January 31, 2011, for left shoulder pain of two weeks duration, after claimant moved a desk at home by herself.[9]

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[7] *Id.* at 26.

[8] *Id.*, Cl. Ex. 4.

[9] *Id.*, Resp. Ex. G.

Claimant was provided pain medication and instructed to return if her condition did not improve. Claimant returned to Dr. Laningham on June 24, 2011, at which time she again complained of left shoulder pain. It was Dr. Laningham who referred claimant to Dr. Clinefelter. On August 5, 2011, Dr. Laningham completed a Group Disability Insurance form requesting long term disability insurance for claimant, indicating her condition was not work-related.

Ronald Williams, safety and security manager for respondent, testified that he supervises some of the warehouse facilities and is claimant's direct supervisor. Mr. Williams testified that the breaking down of pallets that claimant described is only done once or twice a week. He also testified that the forklifts are electric powered and do not bounce around on the concrete floors of the warehouses. He refutes claimant's statement that the forklifts operate like Army tanks.

Mr. Williams testified that before April 22, 2011, claimant volunteered to take time off work, but denies claimant told him it was because the job was too hard or that she was having pain. He testified that he first learned that claimant was alleging a work injury on July 11, 2011, when Rita from human resources called him. After arrangements were made for claimant to fill out an accident report, she was sent to the company physician. Mr. Williams testified that prior to July 11, 2011, claimant never reported to him of any low back or left shoulder injury as a result of repetitive work activities, nor did she ever ask for medical treatment. The paperwork for this claimed accident was filled out on July 14, 2011.

Mr. Williams testified that respondent has a gainsharing program including goals and incentives for work performance and safety. If the company goes a period of time without any accidents, the money saved is shared with the employees. There is no penalty for reporting an accident and it is not discouraged. If an employee does report an injury, the supervisor is to ask if the injury occurred at work.

Mr. Williams testified that claimant's last assignment with respondent was on the south dock were she worked with two other people. They were not made to do any heavy repetitive lifting and were instructed to help each other with the work. Lifting assistance, including two wheelers and hydraulic carts were provided to assist with any heavy lifting.

Marsha Kienzle, human resources supervisor for respondent, testified that one of her jobs is to submit workers compensation claims to the insurance carrier. The first Ms. Kienzle heard that claimant was alleging a work-related injury was on July 11, 2011. Prior to that she was not aware that claimant was alleging a work-related accident or injury. In approximately August, 2011 claimant applied for, but did not receive, short term disability benefits. Claimant was not willing to sign paperwork that would leave her responsible for repaying the benefits she received if her claim was determined to be workers compensation related.

Brian Bierman, distribution manager for respondent, testified that he had been claimant's supervisor before February 20, 2011. Mr. Bierman testified that he doesn't recall having a conversation with the claimant about the seat on her forklift being uncomfortable to the point she had to have bubble wrap on her seat to sit on. He never observed claimant with bubble wrap on the seat of her forklift. Prior to July 11, 2011, she never mentioned any kind of work-related injury to him.

PRINCIPLES OF LAW AND ANALYSIS

Under the law in effect prior to May 15, 2011, in workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[10]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[11]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[12]

This record contains evidence supporting and opposing both claimant and respondent's positions. Medical evidence points to non-work related accidents as well as work related labors causing claimant physical harm. The lay testimony also supports both claimant's and respondent's positions regarding whether claimant suffered personal injury by accident which arose out of and in the course of her employment.

Claimant's job was physically demanding, requiring bending, lifting and carrying objects up to 80 pounds. Although respondent had tools to assist in the lifting, the ongoing requirements of the job were substantial. On the other hand, claimant had a long history of physical ailments, including shoulder, neck and back problems, with some going back almost 20 years. However, when being examined by Dr. Williamson in 2009, her condition stabilized and claimant was able to return to her regular job without restrictions.

Claimant's testimony regarding the information provided to respondent was directly contradicted by every witness who testified on respondent's behalf. However, the ALJ had the opportunity to observe every witness who testified in this matter and determined in

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[10] K.S.A. 2010 Supp. 44-501 and K.S.A. 2010 Supp. 44-508(g).

[11] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[12] K.S.A. 2010 Supp. 44-501(a).

claimant's favor. The ALJ has an advantage in being able to view live testimony. From that advantage comes the opportunity to judge the credibility of the witnesses as they testify. While the Board will not always adopt that determination by the ALJ, the Board will, at times, give credence to that determination. Here, the ALJ found in claimant's favor regarding whether claimant suffered a work-related series of accidents and the resulting injury or injuries.

Additionally, the medical evidence displays evidence of significant degeneration in claimant's spine at several levels. Claimant underwent several epidural injections and was treated with physical therapy and pain medication, with additional treatment recommended. These additional treatment recommendations were made after the 2009 release to regular employment, and after claimant experienced additional pain symptoms while performing the heavy lifting for respondent.

In general, the question of whether the worsening of a claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether the claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.[13]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[14]

This Board Member finds that the conclusion of the ALJ that claimant is in need of ongoing medical treatment stemming from her employment with respondent is supported by this record. The preliminary decision granting claimant ongoing medical treatment with Dr. Galate is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[13] *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

[14] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[15] K.S.A. 44-534a.

CONCLUSIONS

Claimant has proven, by a preponderance of the credible evidence that she suffered a series of micro-trauma accidents which arose out of and in the course of her employment with respondent. The preliminary award of medical treatment is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Preliminary decision of Administrative Law Judge Marcia Yates dated January 31, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2012.

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HONORABLE GARY M. KORTE
BOARD MEMBER

c: Michael J. Haight, Attorney for Claimant
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier
Marcia Yates, Administrative Law Judge